No. 12,081

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK EDWARD ALEXANDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

WESLEY BISSEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PHILIP BOCK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

(Continued on Inside Cover.)

PETITION FOR REHEARING ON AFFIRMANCE OF JUDGMENTS IN CONTEMPT.

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BEN DOBBS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

DOROTHY BASKIN FOREST, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

SAMUEL HARRY KASINOWITZ, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

MARGARET IRIS NOBLE, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

MIRIAM BROOKS SHERMAN, *Appellant,*

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DELPHINE MURPHY SMITH, *Appellant,*

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PETITION FOR REHEARING ON AFFIRMANCE OF JUDGMENTS IN CONTEMPT.

To the United States Court of Appeals for the Ninth Circuit:

The appellants respectfully request that this court grant a rehearing before the court sitting *en banc*.

The court has reached no decision in this cause. Six judges having participated on the merits, the court divided evenly with the result that the lower court was affirmed. Since the submission of the matter, and approximately concurrently with the announcement of the equal division of the judges, the vacancy in the court has been filled and seven judges are now available. There is, therefore, real assurance that a majority of the court will be able to agree on one side or another of the grave constitutional questions here presented. A rehearing is requested to the

end that this court may now reach a majority decision and opinion which until now, without any fault of appellants, it has been unable to provide.

This case involves fundamental constitutional questions of great consequence. The importance of issues relating to the rights of freedom of speech, association, and due process of law have been so frequently stated as to require no citation of authority. Equally deep-rooted and basic in our constitutional system is the privilege against self-incrimination. As the Supreme Court said in the case of *Twining v. N. J.*, 211 U. S. 78:

> "At the time of the formation of the union the principle that no person would be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions."

It is not possible for appellants to point out specifically wherein they believe the court reached incorrect conclusions with respect to these questions, for the only opinion filed on the merits in this case (that of Chief Judge Denman) supports a reversal of the judgment. Therefore, appellants on this petition rely on that opinion and hereby reassert in support of this petition all of the arguments made in their briefs on file herein. There are, however, other reasons, as set forth in the opinion of Chief Judge Denman, which appellants believe do require the granting of this petition.

The appellants as a matter of right have an appeal to this court (see opinion on Motion to Vacate and Set Aside Orders of Judge Denman, page 5). Ordinarily, the court sits in divisions of three. When it sits *en banc,* the full court of seven judges normally participates. Thus, in the ordinary course of the appellate process, an affirmance by a split court is not possible.

The use of an odd rather than an even number of judges is not an accidental or fortuitous circumstance. Rather, it is necessary to effectuate a deep-lying principle of our judicial system, designed to avoid decisions by less than a majority of the judges. That such decisions are eminently unsatisfactory is hardly subject to doubt. They create an area of judicial uncertainty and confusion. The lack of agreement by a majority of the court on the principles of law involved prevents any such dispositions of cases from being authoritative determinations for other cases. (*Hertz v. Woodman,* 218 U. S. 205, 213; *United States v. Pink,* 315 U. S. 203, 216.)

As was justly stated by Mr. Justice Thurman Arnold of the Court of Appeals of the District of Columbia:

> ". . . in judicial proceedings the action of a divided court is not a *decision.* It does not affirm the decision of a court below. Instead, it affirms the *order* or *judgment* or *decree* of the court below. This is not because the appellate court has decided the case. It is, rather, because the appellate court has been unable to decide the case, and therefore cannot reverse the lower court judgment or decree. But this kind of affirmance is not a decision on the facts or law. Neither does it indicate an approval of the lower court's conclusion of fact or law." (Emphasis the court's.)
>
> *Lambras v. Young,* 145 F. 2d 341.

In such a situation, the litigant is left, in effect, without the guidance of that appellate decision to which the law entitles him; the lawyer, without meaningful authority; the lower court, without useful precedent. And how shall the next litigant who finds himself in a position presenting similar issues of law conduct himself? How shall his lawyer advise him? Will another trial judge agree with or disagree with the position of those appellate judges who voted to reverse? If such trial judge feels bound by the affirmance of a split court, then less than a majority of the judges voting are making binding precedent. If, on the other hand, the trial judge feels free and inclined to follow the decision of the judges who voted for reversal, then indeed the affirmance has multiplied the doubts and difficulties in interpretation of the law, which it is a vital function of appellate courts to dispell.

The failure of any of the judges voting for an affirmance to file an opinion increases the uncertainty. It is impossible to determine whether it is the position of the judges voting for affirmance:

1. That, as the Government contends, no witness before a grand jury testifying under stress of contempt has any privilege because he obtains immunity by such testimony;

2. That no questions tending to tie appellants in to the Communist Party could tend to incriminate;

3. That defendants have failed sufficiently to establish the possibility of incrimination either by proof or offer of proof;

4. That this vote for affirmance is based on some entirely different ground.

From the standpoint of the litigant, it is most important to ascertain the basis upon which the court acted, because decisions in these civil contempt cases based upon certain grounds would clearly affect appellants in a manner entirely different from a decision based on other grounds. Thus a decision based upon the proposition that appellants would obtain immunity if they testified would affect them quite differently from a decision that the proof of danger of incrimination was deficient.

The subject matter of this case is such as to evoke deep emotion. Communists and persons alleged to be communists are today being subjected to attacks seldom, if ever, paralleled in American history. These appellants have refused to answer questions which might tie them in with the Communist Party. It is precisely in a case of this kind that the greatest obligation is placed upon the court most carefully and impartially to examine any possible invasion of constitutional rights. The Bill of Rights was not needed for the direct protection of the rights of the majority. It was enacted because of the deep understanding that minorities, and specifically those most sharply under attack, must be afforded certain fundamental guarantees if democracy for the majority is to survive.

Here the appellants are entitled to that reasoned opinion normally accorded to its litigants by this Court of Appeals, as by other appellate courts.

Prior to the decision of this case, the vacancy on the court's bench was filled and it became possible to obtain a majority opinion on the questions presented. To decide the constitutional rights of these defendants otherwise than by a majority would be to hold cheap what is most

dear in our history; it would, we submit, constitute a failure to meet the primary responsibility of this court to reach a decision on the important questions presented to it; it would substitute uncertainty for certainty; and these consequences would result from a refusal to follow weighty precedent that extends back over a hundred years of our judicial history.

As early as 1834, Chief Justice Marshall and the United States Supreme Court were confronted with the problem that faces this court today. A Supreme Court whose full complement then was, like that of this court today, seven members, was lacking a justice. After argument of the cases of *Briscoe v. Commonwealth Bank of Kentucky*, 8 Pet. 118, and *New York v. Miln*, 8 Pet. 120, it was discovered that no majority of the whole court could be obtained for an opinion on the constitutional questions presented. Chief Justice Marshall, speaking for the court, laid down in the following terms, the rule on this subject which has controlled Supreme Court action to the present day:

> "The practice of this court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decions that of a majority of the whole Court. In the present cases four judges do not concur in opinion as to the constitutional questions which have been argued. The court therefore directs these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present."

At the next term this rule was strongly reaffirmed when the cases were set over again because one member was still lacking to make up a full bench of seven. Said Chief Justice Marshall, ". . . as the court is now composed, the constitutional cases will not be taken up." (9 Pet. 85.)

Speaking with approval of this earliest decision on the subject, former Senator C. O. Andrews said, in 19 Fla. Law Journal 238:

> "The reasoning is obvious: That any decision by less than a majority of any court leaves the law uncertain and thus may cause endless litigation of the issues raised."

Under Chief Justice Marshall the Supreme Court actually delayed from 1831 until 1837 the decision of another early case, that of *Charles River Bridge v. Warren Bridge,* 11 Pet. 420, in order that a full court might be obtained for its authoritative disposition.

In the case of *Smith v. Turner,* 7 How. 283, following argument by Daniel Webster and John Van Buren at the December term, 1845, Chief Justice Taney, owing to dissension within the court making impossible the attainment of a majority of the whole court and to death and illness, leaving the court below its full quota of members, ordered reargument at the December term of 1847 and again at the December term of 1848. Decision was therefore not reached until 1849.

It has been said that the practice of ordering reargument when a full court is available prior to decision

> ". . . was undoubtedly founded on the sound principle that when the Constitution of the United States was involved, a decision by a majority of the full Court would carry more weight and receive more

public confidence than a decision by a mere majority of a quorum of justices present, which is always of doubtful validity in any case." (Emphasis in original.)

19 Fla. Law Journal 238, 239.

In the instant case appellants have not been accorded the decision even of a "majority of a quorum of justices present," much less a majority of the full court. This, even though the court recognized the importance of the questions involved by ordering that the case be heard *en banc*. By the peculiar combination of circumstances of this case, the order calculated to obtain a decision given the consideration of the full court, has resulted in no decision at all. Consistency requires that the court assure the rendition of a meaningful decision in a case which it thought significant enough to warrant departure from its usual practice of hearing cases by a division of three judges. To do otherwise would be to treat as not worthy of thorough consideration and decision a matter which the court, by its procedure, has earmarked as being of great importance.

Later Supreme Court action indicates with utmost clarity the great lengths to which that court deems itself required to go in order to fulfill its duty to decide constitutional issues squarely and unavoidably presented to it. Thus, in *Home Insurance Co. v. New York*, after an affirmance by a divided court in 119 U. S. 129, the court's judgment of November 15, 1886, on motion for plaintiffs in error, was on February 7, 1887, ". . . rescinded and annulled, and the case restored to its place on the docket, to be heard by a full bench." Before such reargument could be obtained, three full years and three further deaths of court members unfortunately intervened. Even under these vexing circumstances, the Supreme Court held stead-

fastly to its important and primary purpose of providing justice to its litigants and assuring certainty on constitutional issues for the public; reargument was finally attained on March 18 and 19 of 1890 and a decision was handed down on April 7, 1890.

In the instant situation, a full membership has been obtained once again by this Court of Appeals, even while the cause was under submission and prior to decision. Thus the rendition of full appellate justice in this cause presents no greater or perplexing problem, and reargument is, *a fortiori*, required.

In the income tax cases of *Pollock v. Farmers Loan and Trust Co.*, 157 U. S. 429, the Supreme Court again deemed itself required to grant rehearing where affirmance on certain questions presented was by a divided court. This was true even where the original argument had occupied five days time, and in sketchy outline, occupies well over 100 pages of the report, and where a reversal by an absolute majority of the court had been obtained on some issues presented.

The powerful petition for rehearing in the *Pollock* case, joined in by Joseph Choate, in referring to the procedure followed in the *Home Insurance Company* case, *supra*, stated:

> "A petition for reargument was presented upon the ground that the principle announced by Mr. Chief Justice Marshall should be followed and that the constitutional question involved was sufficiently important to demand a decision concurred in by a majority of the whole court. The petition was granted (122 U. S. 636), and the case was not reargued until the bench was full. 134 U. S. 594, 597. This practice is recognized as established in Phillips' Practice at page 380." (158 U. S. 603.)

The court, in granting the petition for rehearing in the *Pollock* case, did so as to all questions, ". . . to be heard . . . before a full bench." (158 U. S. 606.)

Precedent and justice urgently require the similar treatment of the instant case before this Honorable Court. The rights of the present litigants, the guidance of the public, this court's own rule assimilating its practice to that of the Supreme Court—all these are weighty considerations in demanding a decision that will not in reality constitute merely an inability of this court to reach a decision.

Nor should it be overlooked that the Supreme Court has given its approval to the reaching of decisions in proper cases by Courts of Appeals, sitting with all circuit judges authorized by law, as making "for more effective judicial administration." (*Textile Mills Sec. Corp. v. Commissioner*, 314 U. S. 326, 335. This principle is fortified in the present case by Rule 9 of this court requiring that the practice of the Supreme Court be followed in this Circuit.

Many additional authorities are cited in the opinion herein of Chief Judge Denman. Their repetition here would serve no useful purpose. It is submitted that said opinion sets forth what litigants and the courts have a right not only to hope for, but to expect, from appellate courts.

In delineating the treatment which should be given special questions of fundamental law of the kind here presented, our Supreme Court has said:

> "The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of con-

stitutional power differently from those which concern merely private right. *Briscoe v. Bank of Kentucky,* 8 Pet. 118. We are not accustomed to hear them in the absence of a full court, if it can be avoided."

Legal Tender Cases, 12 Wall. 457, 554.

One more point should be noted. Cases involving substantially identical questions of law and fact as those presented herein are now before this court. Whether acted upon *en banc* or by a division of the court, a majority decision will now be obtained in those cases.

It would be an anomaly, indeed, should one result be reached in the instant cases by default, as it were, caused by the equal division of the judges, and a different result reached in the new cases only because an odd number of judges would assure a majority vote. Similarly, it would shake confidence in the court if, assuming the new cases should be assigned to a division, the foreseeability of the outcome were affected by the particular combination of judges selected from the six who were unable to make a majority. Every consideration of practical administration of justice argues that the issue presented by the cases at bar be determined by the court for the guidance of its members as well as of litigants.

The granting of a rehearing should necessitate no long delays nor unduly burden this court. It must pass upon the questions again, in any event. In view of the briefs already filed, the argument on all of the grand jury cases can be heard quickly and with comparatively short addi-

tional briefs. In view of the sharp division, further argument might be helpful in clarifying the views of the court. All in all, it would seem that the very function of this court would best be served by the granting of this petition.

Conclusion.

The American tradition of justice is the product of a vigorous and passionate history. It has its roots in a struggle against government tyranny that changed the course of world history. To assure protection of the people's rights, principles were adopted which, to some, seemed to weaken the powers of government. However, those who enunciated the principles upon which our democracy is based believed that there could be no strong democratic government which did not, first of all, secure the liberties of all individuals. In effectuating this principle, the courts have had a great function to perform.

> "Under our constitutional system courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered or because they are nonconforming victims of prejudice and public excitement. . . . No higher duty, nor more solemn responsibility, rests upon this court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."
>
> *Chambers v. Florida,* 309 U. S. 227, 241.

This high purpose and responsibility has not been and cannot be carried out by the divided opinion of this court. The opportunity for effecting these objectives by a majority decision and without unreasonable delay exists; the necessity for it is clear; this petition for rehearing should be granted.

Respectfully submitted,

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Certificate of Counsel.

I, Ben Margolis, one of the counsel in this case, hereby certify that in my judgment the petition for rehearing is well founded and said petition is not interposed for delay.

BEN MARGOLIS.